



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OUKO & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. 97 OF 2014 (UR NO. 80/2014)

BETWEEN

KIAMBU COUNTY GOVERNMENT1ST APPLICANT

THE GOVERNOR KIAMBU COUNTY 2ND APPLICANT

THE DEPUTY GOVERNOR KIAMBU COUNTY 3RD APPLICANT

THE EXECUTIVE COMMITTEE KIAMBU COUNTY..... 4TH APPLICANT

AND

ROBERT N. GAKURU & OTHERS RESPONDENTS

(An application for stay of execution from the judgment and decree of the High Court of Kenya at Nairobi (Odunga J.) dated 17th April, 2014

in

PETITION NO. 532 OF 2013

CONSOLIDATED WITH

PETITION NOS. 12 OF 2014, 35 OF 2014, 36 OF 2014, 42 OF 2014, 72 OF 2014 & JUDICIAL REVIEW MISC. APPL. NO. 61 OF 2014)

RULING OF THE COURT

Pursuant to the provisions of **Articles 185 and 209 (3)** of the Constitution the County Assembly of Kiambu County Government (the 1st applicant) enacted the Finance Act, 2013 which imposed a wide range of tax measures. Several business people drawn from the county together with some residents (the respondents) who felt affected by the new tax regime variously moved the High Court by Constitutional Petition Nos. 532 of 2013, 12 of 2014, 35 of 2014, 36 of 2014, 42 of 2014 and 72 of 2014 as well as through Judicial Review Miscellaneous Application No. 61 of 2014. Because they raised

similar issues against the applicants, the actions were consolidated and determined in Petition No. 532 of 2013.

In short, the County Government of Kiambu Finance Act, 2013 was being challenged by the respondents on the grounds that it was introduced and passed without their participation; that certain provisions of the Act imposing levies and taxes which the 1st applicant had no powers to impose were therefore in violation of the Constitution.

The applicants on their part maintained that there was full participation by the population within Kiambu County in the form of representation of the population by Members of the County Assembly (MCAs) in the Assembly, an advertisement in the *Daily Nation* newspaper of 17th August 2013, in the county website and a notice circulated to churches in the county drawing the attention of the public to the content of the Bill before its enactment and inviting their input. This, in the applicants' view constituted sufficient public participation. In any case, they argued, the County Assembly considered the first Bill and rejected it with specific recommendations which were taken into account in the enactment of the Finance Act, 2013. Secondly, the Constitution, the County Government Act, 2012 and the Public Finance Management Act, 2012 authorised the applicant to impose permit fees, licence fees and rent fees to finance its operations and to provide other services in the county.

The applicant further argued that the respondents failed to specifically plead the actual rights and fundamental freedoms alleged to have been breached or threatened by the enactment contrary to the decision in **Mumo Matemo V. Trusted Society of Human Rights Alliance and 5 others** [2013] e KLR.

Having heard counsel representing all the parties, the learned Judge understood the respondents' grievance to raise the following issues which he embarked on resolving.

“1. Whether the Kiambu Finance Act, 2013 was passed with sufficient public participation as required by the Constitution of Kenya, 2010.

- 2. Whether the County Government of Kiambu is entitled to publish and/or raise new or existing taxes.**
- 3. Whether the levies and charges under the Kiambu Finance Act are within the meaning of the 4th Schedule of the Constitution of Kenya.”**

In the learned Judge's opinion, the nature and extent of public participation may vary depending on the nature of what is at hand. On the question of public participation and quoting extensively from South African cases of **Doctors for Life International V. Speaker of the National Assembly & others** [CCT 12/05] ZACC 11/2006 (12) BCLR 1399 SA 416 and **Merafong Demarcation Forum & Others v. President of the Republic of South African & Others** [CCT 41/07]

(2008) ZA CC10, he expressed the following opinion:

“67. It must be made clear that not all persons must be heard orally. Therefore, even in cases where there are oral public hearings, the mere fact that a particular person has not been so heard does not necessarily warrant the whole process being nullified..... In my view, where a Bill has been rejected by the Assembly and a fresh Bill introduced as opposed to mere amendments, the principle of public participation must equally apply. Unless this is so, the principle may be defeated by the Assembly simply rejecting a Bill in which the public has had an input with its own Bill disregarding the input by the public and not subjecting it to public participation. That in my view would defeat the very principle of public participation.

.....

75. In my view, public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purpose of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many forum as possible such as churches, mosques, temples, public *barazas*, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”

From the foregoing, the learned Judge concluded that the people of Kiambu were not expected to participate in the pre-enactment process of the Act through their elected representatives in the Assembly; that the newspaper advertisement and meetings held in hotels were not sufficient, hence there was no public participation. On whether the Act contravened the Constitution, the learned Judge found that whereas the County Government could impose property rates and entertainment taxes, it had no powers to levy charges on the quarry stones. With that, he declared the County Government of Kiambu Finance Act, 2013 unconstitutional, null and void.

The applicants have been aggrieved by this decision and have by a notice of appeal filed in the High Court, evinced their intention to challenge it on appeal to this Court. Pending the determination of the appeal, which we understand has been lodged being Civil Appeal No. 200 of 2014, the applicants, by a motion on notice wish to have the enforcement of that decision stayed because, according to them, the intended appeal will be arguable on, *inter alia*, the question of whether or not there was public participation, whether the Governor (2nd applicant), the Deputy Governor (the 3rd applicant) and the Executive Committee Kiambu County (the 4th applicant) were properly sued in view of the 1st applicant's capacity in law to sue or be sued; whether the respondents failed to specify which one (or ones) of their fundamental rights were violated, and whether the Court erred in finding that the 1st applicant had no powers to impose certain taxes.

The applicants have further argued that, following the decision of the High Court nullifying the Finance Act, 2013, the 1st applicant has been deprived of any legal basis and power to raise revenue and fees with the result that its operations will be crippled unless an order staying the implementation of that decision is issued.

The respondents have opposed the application arguing that it does not meet the requisite threshold; that the applicants are not entitled to an equitable remedy of stay of execution because they have continued to levy and collect taxes contrary to the order of the court; that no purpose will be served by granting the prayers in this application as the 1st applicant has begun the enactment of the Finance Bill, 2014; that this court cannot give life to a statute that has been declared by a Court of competent jurisdiction to be unconstitutional; and that the 1st applicant will not suffer any prejudice as it has other sources of income to finance its operations.

These arguments are evidently premised on the requirement of **Rule 5 (2)**

(b) of the Court of Appeal Rules under which the application is anchored, namely, whether the appeal is arguable, and secondly, whether the dismissal of the application for stay would render the success of the appeal nugatory. See **Githunguri V. Jimba Credit Corporation Ltd & Others** [1988] KLR 838. For the application to succeed, both limbs must be demonstrated to exist. See **Reliance Bank Ltd. V. Norlake Investment Ltd** [2002] 1 EA 227.

In considering the application, we also bear in mind the following strictures, that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the court, that, whether or not an appeal will be rendered nugatory is a question of fact which must depend on the peculiar facts and circumstances of each case, and whether or not what is sought to be stayed if allowed to happen is reversible, if it is not reversible, whether an award of damages will be sufficient for the purpose of the application. In dealing with the question whether the success of the appeal will be rendered nugatory if stay is not granted, the Court ought to weigh the claims of both sides of the dispute. The duty of the Court at this stage does not involve consideration of the merit of the intended appeal. That is for the bench that will ultimately hear the appeal. We are guided in these propositions by a long line of decisions of this Court, some of which were cited before us in the course of arguments, namely; **Ibis Aviation V. Equatorial Commercial Bank & Another** [1999] 1 EA pg 141, **Oraro & Rachier Advocates V. Co-operative Bank of Kenya Ltd,** [1999] 1 EA pg 236.

The first question we have to determine is whether or not, on the material presented before us, the applicant has an arguable appeal to canvass when the appeal comes up for hearing. The applicant has, both in the draft memorandum of appeal and in the affidavit in support of the application, shown the grounds on which it will be asking this Court to interfere with the exercise by the learned Judge of his discretion. The combined effect of those eighteen (18) grounds can be condensed into three as follows:-

- i. The learned Judge misdirected himself on the question of public participation.

- ii. The learned Judge was in error for failing to find that no cause of action was maintainable in law as against the Governor, Deputy Governor and the Executive Committee.
- iii. The learned Judge erred in failing to hold that a breach of fundamental rights and freedoms must be specifically pleaded and particulars thereof set out.

We believe that the above three (3) grounds are not frivolous especially the question whether or not the County Government of Kiambu Finance Act, 2013 was subjected to public participation before enactment, upon which the decision of the learned Judge turned.

Having been satisfied that the appeal is arguable, we turn to consider the question whether a refusal to grant the order of stay will render the success of the appeal nugatory.

On behalf of the applicants, Mr. Masese contended that following the repeal of the Local Government Act, the declaration of the Kiambu County Government Finance Act, 2013 a nullity has created a vacuum and caused paralysis in the County as the 1st applicant has no legal basis to collect revenue for its operations, including payment of salaries for its workers. As a result of the decision, it is deponed, the residents of the County have refused to pay any fees, levies or taxes and are instead demanding a refund of taxes they have already paid under the nullified law.

Prof. Kiama and Mr. Mureithi, learned counsel representing the 1st to 3rd respondents together with the 4th and 5th respondents, who acted in person in this application, are convinced that the appeal cannot be rendered nugatory because the County Government of Kiambu has already commenced the process of enacting County of Kiambu Finance Act, 2014/2015, hence this application has been overtaken by events. In any case, they submitted, the 1st applicant has continued to levy and collect taxes from the residents of the county, notwithstanding the nullification of the statute; that the County Assembly has already passed the Kiambu County Supplementary Appropriation Act, 2014.

Mr. Masese confirmed and indeed it is in the public domain that the County Assembly of Kiambu is in the process of enacting the 2014/2015 Finance Act. In their own averment, in the notice of motion, the applicants state that the nullified statute would in any case have ceased to apply in September 2014 by operation of the provisions of the Public Finance Management Act. They have further sworn that although some individuals who paid the taxes before the nullification of the Act have demanded a refund, the 1st applicant is unable to make any refund because the funds collected have been expended.

The applicants are apprehensive that should the Court decline to grant a stay, the operation of the 1st applicant would be paralysed on account of lack of funds. It was their duty, in order to succeed, to illustrate that indeed this loss was likely to happen, and that damages would not adequately ameliorate the loss.

The 1st applicant is required by **Article 207** of the Constitution as a County Government to establish and administer the Revenue Fund into which are paid all money raised or received by or on behalf of the County Government. In terms of **section 109** the Revenue Fund which is kept in the Central Bank of Kenya in an account known as the "*County Exchequer Account*" cannot be overdrawn. No attempt was

made to disclose the status of that account so as to demonstrate that due to lack of funds, the County Government of Kiambu was, as it were, “in the red.” Besides that account, **section 116** of the Public Finance Management Act envisages the existence of other accounts, such as Emergency Fund and other County public funds. Further, the 1st applicant, like all other counties, is authorised to borrow. It is permitted to receive grants, its equitable share of national revenue under **Article 202** of the Constitution and **section 3** of the Division of Revenue Act, 2014.

It was alleged but not controverted that the 1st applicant continues to impose and collect taxes despite the nullification of Finance Act, 2013. Several receipts allegedly issued by the 1st applicant in respect of some fees (called canter) in the sum of Kshs. 50/= was annexed to the respondents’ affidavits. The continued collection of taxes, we think, was bolstered by a letter dated 25th April 2014 addressed to all traders in Kikuyu Market, a copy of which was annexed to one of the replying affidavits, advising the traders to continue paying the taxes and levies as the “*suspension*” of the Finance Act, 2013 did not affect payment of county fees and charges.

We have said all these things to show that the applicants have not demonstrated how its operations and provision of service to the people of Kiambu County will be paralysed and hence how the success of their appeal will be rendered nugatory. Finally, we also fail to comprehend how a declaration of nullity can be stayed as such an order is not capable of being executed in the first place.

In the result, we come to the conclusion that the applicant has failed to pass the second test for the granting of the orders of stay. Accordingly the notice of motion dated 28th April 2014 fails and is dismissed with costs in the appeal.

Dated and delivered at Nairobi this 18th day of December, 2014.

W. KARANJA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR



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